

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Revision of Part 22 of the)
Commission's Rules Governing the)
Public Mobile Services)

CC Docket No. 92-115

)
Amendment of Part 22 of the)
Commission's Rules To Delete Section)
22.119 and Permit the Concurrent Use)
of Transmitters in Common Carrier and)
Non-common Carrier Services)

CC Docket No. 94-46
RM 8367

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)
Amendment of Part 22 of the)
Commission's Rules Pertaining to Power)
Limits for Paging Stations Operating)
in the 931 MHz Band in the Public Land)
Mobile Service)

CC Docket No. 93-116

COMMENTS OF McCAW CELLULAR COMMUNICATIONS, INC.

McCaw Cellular Communications, Inc. ("McCaw")¹ hereby submits its
comments in support of the joint proposals of the Mobile and Personal Communications
Division of the Telecommunications Industry Association ("TIA") and the Cellular
Telecommunications Industry Association ("CTIA") for limited modification of Section
22.919 of the Commission's Rules.² McCaw believes that adoption of the limited

¹ McCaw is a wholly-owned subsidiary of AT&T Corp.

² See Joint Reply of the Mobile and Personal Communications Division of the
Telecommunications Industry Association and the Cellular Telecommunications
Industry Association, CC Dkt. No. 92-115 (filed Feb. 2, 1995) ("TIA/CTIA Joint
Reply"). These comments are being submitted pursuant to the Commission's Order,

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revisions set forth by TIA and CTIA will retain critical safeguards against fraudulent cellular usage while seeking to accommodate legitimate needs for alteration of cellular telephone electronic serial numbers ("ESNs").

McCaw viewed adoption of new Section 22.919, which embodies previously established Commission policy and practice, as an essential step in combatting cellular fraud. McCaw accordingly opposed efforts to modify or undercut this rule in the petitions for reconsideration of the *Part 22 Rewrite Order*.³ McCaw did observe, however, that the Commission could resolve any uncertainties by "clarify[ing] that

²(...continued)

DA 95-402 (Mar. 2, 1995) ("*Extension Order*") in connection with the petitions for reconsideration of the *Report and Order* in the above-captioned proceeding, 9 FCC Rcd 6513 (1994) ("*Part 22 Rewrite Order*"). McCaw understands that no additional submission, as contemplated by the *Extension Order*, was made by TIA and CTIA, and thus only proposals contained in the TIA/CTIA Joint Reply are the subject of these comments. *See Extension Order*, ¶ 4.

³ *See* Comments of McCaw Cellular Communications, Inc. on Petitions for Reconsideration and Clarification, CC Dkt. No. 92-115, at 4-16 (filed Jan. 20, 1995) ("McCaw Reconsideration Comments"); Celltek Corporation Petition for Reconsideration to Proposed Changes to FAR 22.919; Cellular Paging Systems, Inc. Petition for Reconsideration; Petition for Reconsideration of C-Two-Plus Technology, Inc.; Petition for Reconsideration of The Ericsson Corporation; Zachary Len Gibson Petition for Reconsideration; Edwin G. Jones Petition for Reconsideration; MTC Communications Petition for Reconsideration; Sound & Cell Petition for Reconsideration to Proposed Changes to FAR 22.919; M.C. Stephan Petition for Reconsideration; the Mobile and Personal Communications 800 Section of the Telecommunications Industry Association Petition for Clarification and Reconsideration.

software and firmware upgrades to phones that are not associated with the ESN are permitted."⁴

TIA and CTIA have suggested modifications to Section 22.919 that would:

(a) require that cellular mobile equipment receiving Type Acceptance approval after July 1, 1995 comply with industry authentication standards, and (b) allow manufacturers to transfer ESNs in connection with normal repair and service upgrade activities *provided that* (i) the unit's original factory-set ESN is utilized at all times to uniquely identify the unit, and (ii) if the unit has been activated for service on a carrier's system, any transfer of an ESN assigned to that unit must take place at a location owned and operated by the unit's manufacturer.⁵

With respect to authentication procedures, McCaw continues to agree that such protocols in fact eventually will play an important role in controlling cellular fraud.⁶ McCaw accordingly concurs in the recommendation that all cellular mobile transmitters receiving type acceptance approval after July 1, 1995, be required to comply with industry standards regarding authentication. At the same time, authentication alone is not an adequate substitute for the limitations on ESN manipulation embodied in Section 22.919 -- which the TIA and CTIA joint proposal appears to recognize. This is the case because some systems may lack the capabilities necessary to deploy the authentication activities described by TIA and CTIA well into the future.

⁴ McCaw Reconsideration Comments at 15.

⁵ TIA/CTIA Joint Reply at 4 (italics in original; footnote omitted). TIA and CTIA contemplate that the manufacturer rights would extend to a manufacturer's commonly owned and controlled affiliates. *Id.* at 4 n.9.

⁶ See McCaw Reconsideration Comments at 15.

McCaw also does not oppose the revisions to the rule intended to permit "manufacturers to undertake certain unit repair and upgrade activities without compromising the effectiveness of the FCC's anti-fraud rules."⁷ The Commission should ensure, however, that any exceptions to the general prohibitions contained in Section 22.919 on ESN alteration, transfer, removal, or manipulation must be both carefully crafted and strictly enforced. As the Commission is well aware, as soon as one loophole is closed, perpetrators of cellular and other telecommunications fraud find another means to pursue their illicit activities. The Commission must ensure that any revised rule section concerning ESNs does not somehow, regardless of the intentions of TIA and CTIA, open the door for fraudulent use of cellular phone service.


For the reasons stated above and in its earlier comments on the reconsideration petitions, McCaw supports limited modification to Section 22.919 of the Commission's Rules as suggested by TIA and CTIA, but also urges the Commission otherwise to

⁷ TIA/CTIA Joint Reply at 7. For example, the United States District Court for the Southern District of Texas recently issued a preliminary injunction (a copy of which is attached) determining that emulation violates the Commission's policies and enjoining the defendants from emulating the ESNs of cellular telephones where Houston Cellular Telephone Company is the carrier.

maintain the limitations on ESN manipulation due to their importance in Commission and industry efforts to combat cellular fraud.

Respectfully submitted,

**McCAW CELLULAR
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April 3, 1995

United States District Court
Southern District of Texas
Houston Division

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

MAR 17 1995

HOUSTON CELLULAR
TELEPHONE COMPANY,

Plaintiff,

Michael M. Nandy, Clerk

VERSUS

CIVIL ACTION H-95-617

JOHN C. NELSON, Doing Business as Both
Cell Time Cellular and Action Cellular and
DAVEY HART, Doing Business as
Action Cellular and
ACTION CELLULAR EXTENSION, Inc.,

Defendants.

PERMANENT INJUNCTION

A. Findings.

Based on the stipulations and evidence, the court makes these findings:

1. John C. Nelson, Jr., who has done business as Cell Time Cellular and who is a representative of Action Cellular Extensions, Inc., has engaged in the emulation of the electronic serial numbers of cellular telephones since August 9, 1994.
2. Daniel K. Hart, as a representative of Action Cellular Extensions, Inc., has engaged in the emulation of the electronic serial numbers of cellular telephones since December 15, 1994.
3. Action Cellular Extensions, Inc. has engaged in the emulation of the electronic serial numbers of cellular telephones since December 15, 1994.
4. On May 4, 1991, after notice in the Federal Register, the Federal Communications Commission issued the Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, and Amendment to Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems. (86 F.C.C. 2d 469 (1991)). It adopted the technical specifications for cellular telephones that such telephones have a unique electronic serial number. This order was published in the

Federal Register on May 21, 1981 (46 Fed. Reg. 27655) with corrections on June 16, 1981 (46 Fed. Reg. 31617).

5. On September 9, 1994, after notice in the *Federal Register*, the FCC issued the Revision of Part 22 of the Commission Rules Governing the Public Mobile Services (9 FCC Rad 6513 (1994)). This FCC order was published in the *Federal Register* on November 17, 1994 (59 Fed. Reg. 59502).

6. Houston Cellular has suffered irreparable damage as a consequence of defendants' emulation of the electronic serial numbers of cellular telephones for which it is the carrier. The defendants' actions have deprived Houston Cellular of monthly access charges and other per unit charges its customers would owe for additional connections.

7. Although the damage is describable, Houston Cellular cannot reliably quantify it, making the legal remedy inadequate.

8. The acts of the defendants are analogous to their having installed unauthorized access to a cable television network. This piracy injures the utility and its legitimate customers.

9. No unrepresented third-party nor any diffuse public interest is adversely affected by the restrictions this injunction imposes on Nelson and Hart.

B. *Conclusions*

1. The FCC orders were regularly made, published in the *Federal Register*, and served on defendants by publication. 5 U.S.C. § 552(e)(1). See also, *Fed. Corp. Inc. v. Merrill*, 332 U.S. 380, 384-85 (1947).

2. These orders adopted by the FCC constitute orders within the meaning of § 401(b) (47 U.S.C. § 401(b)) of the Communication Act of 1934.

3. Emulation of the electronic serial numbers of cellular telephones by Nelson, Hart, and Action Cellular Extensions, Inc., violates the two FCC orders.

4. Section 401(b) of the Communication Act of 1934 expressly authorizes injunctive relief for a party injured by disobedience of an FCC order. The prerequisites of irreparable injury need not be established where such injunctive relief is expressly authorized by statute. *United States v. Hayes Int'l Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969); *Greesham v. Wintrust Partners*, 730 F.2d 1417, 1423 (11th Cir. 1984). Although Houston Cellular need only demonstrate that it has been injured to satisfy this standard, having found that it was in fact irreparably injured by defendants' acts and in an amount not susceptible to calculation, the court concludes that injunctive relief is available as common law.

C. *Information.*

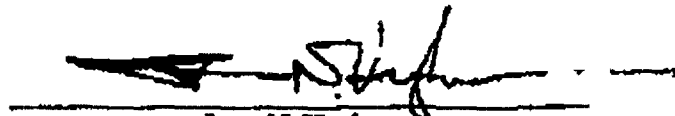
Based on these findings and conclusions, John C. Nelson, Jr., Daniel K. Hart, and Action Cellular Extensions, Inc., are enjoined permanently from emitting electronic serial numbers of cellular telephones for which Houston Cellular is the carrier.

This restriction binds them and all those who may knowingly act in concert with them, including employees, agents, and consumers.

1. Specifically, the defendants are enjoined from storing, transmitting, emitting or manipulating electronic serial numbers of cellular telephones for which Houston Cellular is the carrier except in strict compliance with the FCC orders.
2. The defendants shall produce immediately to Houston Cellular those documents, including those seized by the United States Marshal and others in their possession or within their access:
 - A. All lists, files, records, or other information containing names, addresses, or telephone numbers of entities for whom they stored, transferred, emitted, or manipulated the electronic serial numbers of cellular telephones from January 1, 1990, to March 15, 1995.
 - B. All advertisements, brochures, or other documents that advertised services to the public for storing, transferring, emitting, or manipulating the electronic serial numbers of cellular telephones.
 - C. Documents in their possession that identify other entities which offer services to alter, transfer, emulate or manipulate the electronic serial numbers of cellular telephones.
 - D. Documents evidencing a business relation or transaction with Technology, Inc.
 - E. A complete copy of all data on any storage medium, including paper-based, hard-disk, and removable-disk data (hard, removable, floppy, optical, and tape drives and RAM), Houston Cellular will reimburse the defendants for copying costs incurred in producing a hard copy.
3. With the exception of Houston Cellular subscribers' service orders or equipment, the defendants are enjoined to retain the originals of those documents, providing Houston Cellular with photocopies. The defendants may retain photocopies of the Houston Cellular subscribers' service orders or contracts only for the purpose of assisting in re-emulation. The defendants will surrender to Houston Cellular all photocopies at the completion of the re-emulation or upon written request of Houston Cellular.

4. This order does not require that the defendants produce C2+ Technology, Inc., proprietary information, equipment, or accessories in any form.
5. This is a final judgment. The court retains jurisdiction to enforce the injunction and the settlement from which it arose.

Signed March 15, 1995, at Houston, Texas.



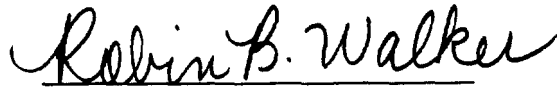
Lynn N. Hughes
United States District Judge

CERTIFICATE OF SERVICE

I, Robin Walker, hereby certify that I have caused a copy of the foregoing **Comments of McCaw Cellular Communications, Inc.** to be served this 3rd day of April 1995, by first class mail, postage prepaid, to the persons set forth below.

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